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No. 97-428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,

Petitioner,

v.

ROBERT A. MILLER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15, Respondents Robert A. Miller, *et alia* ("the Pilots"), oppose the Petition of the Air Line Pilots Association ("ALPA").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Besides the provisions set out in the Petition ("Pet.") at 2, this case raises issues under Article III of the Constitution of the United States. It provides in pertinent part:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . .

REASONS FOR DENYING THE PETITION

I. Whether Nonunion Employees Must Exhaust a Union's "Impartial Decisionmaker" Procedure Before They May Challenge the Union's Agency Fee in Court Was Implicitly Decided in *Teachers Local 1 v. Hudson*, and Ought Not to Be Revisited on the Record in This Case. Being More Imaginary than Real, the Conflict Among the Circuit Courts to Which ALPA Points Also Does Not Support a Writ of Certiorari.

In light of *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), that the Pilots need not exhaust ALPA's "impartial decisionmaker" procedure before they may challenge the union's agency fee in court is really not a controversial issue. Therefore, a writ of certiorari is inappropriate here.

A. ALPA cannot deny the black-letter rule of law that a party can be required to arbitrate a dispute only where there is a contract or other voluntary agreement to do so, or some statutory mandate. *E.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974); *Abrams v. Communications Workers*, 59 F.3d 1373, 1382 & n.14 (D.C. Cir. 1995). Neither can ALPA deny that the Pilots did not contract for, or otherwise agree to, arbitration of their agency-fee dispute. Some of the Pilots participated in ALPA's arbitration only under protest, after the District Court denied an injunction to stop it. Others refused to participate at all. (Appendix ("App.") at 2a-3a.)

Moreover, the Pilots are nonmembers of ALPA. (*Id.* at 2a.) As such, they are "not bound by contract with the union to

exhaust any formal internal union appeals before resorting to a judicial forum." *Soto Segarra v. Sea-Land Serv., Inc.*, 581 F.2d 291, 295 (1st Cir. 1978); *see Bagnall v. ALPA*, 626 F.2d 336, 341 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

The mere existence of a collective-bargaining agreement negotiated by ALPA could not require the Pilots to arbitrate their disputes with ***itself***, as opposed to disputes with their employer. *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 368-69 (6th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Bagnall*, 626 F.2d at 342; *but see Lancaster v. ALPA*, 76 F.3d 1509, 1524-26 (10th Cir. 1996).[1] And, as even the District Court recognized in this case, (App. at 30a), ALPA cannot contend that the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88 (1988), requires arbitration of agency-fee disputes. *See Bagnall*, 626 F.2d at 342.

B. ALPA maintains, however, that whether a court should require exhaustion of arbitration in an agency-fee context is an open, contentious issue, because *Hudson* "did not address the question of whether an objector must exhaust [a union-imposed arbitration] procedure before bringing suit in court" on an agency-fee dispute. (Pet. at 11.)

To the contrary, in holding that the union's procedure in *Hudson* was constitutionally "inadequate because the selection [of the arbitrator] represents the Union's unrestricted choice," this Court noted that, even if both parties selected the arbitrator,

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[1] On this point (as well as others discussed *infra* p. 11), *Lancaster* is clearly wrong. *See Abrams*, 59 F.3d at 1382 ("procedure requiring an objector who challenges [an agency fee] to exhaust Union-provided arbitration violates [the] duty of fair representation by limiting the choice of forum for the challenge"); App. 163a (Silberman, J., concurring in denial of rehearing) ("under the agency shop agreement, ALPA is the agent for the nonmembers only vis-à-vis the employer, it is not an agent for the nonmembers vis-à-vis itself").

"[t]he arbitrator's decision would not receive preclusive effect in any subsequent [42 U.S.C.] § 1983 [(1988)] action. See *McDonald v. [City of] West Branch*, 466 U.S. 284 (1984)." 475 U.S. at 308 & n.21. The Court was aware of Justice White's suggestion that "if the union provides for arbitration . . . it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts," but chose not to accede to it. *Compare id.* at 311 (concurring opinion) *with id.* at 308-09 (opinion of the Court). The Court's action clearly implies that, if the union alone opts for arbitration, arbitration cannot be required of nonunion employees.

As *Hudson* recognized by citing *McDonald*, compelled arbitration can never be appropriate, because arbitration cannot provide "an adequate substitute for a judicial proceeding in protecting . . . federal statutory and constitutional rights." *McDonald*, 466 U.S. at 290. The Pilots' claim that some of ALPA's expenditures of their agency fees were not "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative" raises issues under both the RLA and the First Amendment to the United States Constitution. *See Ellis v. Railway Clerks*, 466 U.S. 435, 445-48, 455-56 (1984).

The district courts Congress created under Article III of the Constitution "have original jurisdiction of all civil actions arising under the Constitution [or] laws . . . of the United States," including "any civil action . . . arising under any Act of Congress regulating commerce." 28 U.S.C. §§ 1331, 1337(a). Neither the RLA nor any other statute delegates this jurisdiction to arbitrators designated by unions in agency-fee cases. Therefore, Article III and the ***Judicial Code*** prohibit federal courts from deferring, on issues of law or fact, to "non-statutory arbitration conducted by a privately appointed decisionmaker" in agency-fee cases. *Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 692 (6th Cir. 1996) (§ 1983 case), *cert. denied*, 117 S. Ct. 682 (1997); *see Stauble v. Warrob, Inc.*, 977 F.2d 690, 696-98 (1st Cir. 1992); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1169 (D.C. Cir. 1991).

Furthermore, whether arising under the RLA or the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-69 (1988), disputes about agency fees involve a union's duty of fair representation ("DFR"). *E.g., Communications Workers v. Beck*, 487 U.S. 735, 742-44 (1988) (NLRA); *id.* at 745-47, 752 (the agency-fee provisions of the RLA and NLRA must be interpreted "in the same manner"). This Court first created the DFR under the RLA. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). It later applied the same duty to unions operating under the NLRA. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). This Court then held that the judiciary retained and should exercise original jurisdiction over DFR claims, although those claims might raise issues otherwise cognizable as "unfair labor practices" normally within the exclusive jurisdiction of the National Labor Relations Board. *Vaca v. Sipes*, 386 U.S. 171, 176-88 (1967); *accord Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74 (1989). Subsequently, the Court applied this principle to agency-fee cases. *Beck*, 487 U.S. at 742-44.

Clearly, if federal courts need and ought not defer to a federal agency in agency-fee cases arising under the DFR, they need and ought not defer to a private arbitration set up by the very union that employees claim violated its DFR. Indeed, a "procedure requiring an objector who challenges [an agency fee] to exhaust Union-provided arbitration violates [the] duty of fair representation by limiting the choice of forum for the challenge." *Abrams*, 59 F.3d at 1382. Although *Hudson* did not advert explicitly to the DFR (no doubt because *Hudson* was a public-sector case arising under § 1983), this Court grounded its entire analysis on "***[b]asic considerations of fairness***, as well as concern for the First Amendment rights at stake." 475 U.S. at 306 (emphasis added); *see Abrams*, 59 F.3d at 1379 n.7.

Hudson did not suggest that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice," to oust the courts of jurisdiction in cases in which unions adopt an arbitration

scheme. 475 U.S. at 308 n.21. It made that point to "reject the Union's suggestion that the availability of ordinary judicial remedies is sufficient" to meet the union's special, independent responsibility itself "to provide procedures that . . . facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20.

That is, to render an agency-shop arrangement arguably constitutional at all, a union must affirmatively establish a procedure for an expeditious decision by an "impartial decision-maker." But the Court clearly countenanced no notion that the union could compel nonunion employees to resort to such a procedure before seeking judicial relief.

To the contrary, *Hudson* "presume[d] that the courts remain available as the ultimate protectors of constitutional rights." *Id.* at 307 n.20. Creation of a scheme for an "impartial decision-maker" is thus a special duty *Hudson* imposed on unions solely to "***facilitate*** a nonunion employee's ability to protect his rights," *id.* (emphasis added), if the employee chooses to avail himself of it. It is not a grant to unions of new powers over such employees. If nonunion employees believe, as the Pilots do, that such a scheme does not facilitate, but rather impedes, their rights, they remain free to seek "ordinary judicial remedies," *id. See Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990) (a requirement that nonunion employees exhaust arbitration before seeking judicial relief "unduly implies a limitation upon the [nonmembers'] constitutional rights").

C. Even if *Hudson* could be read to have left debatable the issue of whether nonunion employees can be compelled to use an arbitration in which "the arbitrator's selection did not represent the Union's unrestricted choice," 475 U.S. at 308 n.21, (which the Pilots deny), the record here is not suited for resolution of that issue. *Hudson* expressed deep concern with unilateral selection of an arbitrator by a union, finding such a scheme unconstitutional under the First Amendment "because the selection represents the Union's unrestricted choice from the state list." 475 U.S. at 308.

In *Hudson*, "the Union President . . . select[ed] an arbitrator from a list maintained by the Illinois Board of Education." *Id.* at 296. Here, ALPA has selected the American Arbitration Association ("AAA") as its intermediary. "[A]t the union's request, the AAA appointed an arbitrator in accordance with its rules from 'a special panel of arbitrators experienced in employment relations.'" (App. at 2a.)

This is a procedural distinction without a practical difference. In both cases, the union selected ***the list*** from which ***someone other than the nonunion employees*** chose the arbitrator. As the Court of Appeals observed, "It may well be . . . that the arbitrators chosen by the AAA from a group 'experienced in labor matters' would not be perceived as typically sympathetic to [the Pilots] (or their counsel)." (*Id.* at 12a.)[2] It strains credulity to the breaking-point to believe that ALPA chose to employ the AAA's "special panel of arbitrators experienced in employment relations" for a reason other than that it considered those individuals friendly to its position.

In any event, however, the record does not show whether in practice ALPA's scheme amounts to "the Union's unrestricted choice," because of the attitudes of the "special panel of arbitrators," or somehow might be deemed as fair as a mutual choice of the arbitrator by both ALPA and the Pilots. The record also does not show how the special panel is selected or what say, if any, unions have in that selection.

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[2] The Pilots' perception here was certainly borne out, because the arbitrator selected by the AAA denied them any discovery, (App. at 3a), thus tilting the playing field in ALPA's favor.

Thus, any attempt to resolve this issue now would entangle this Court in a purely hypothetical case.[3] The Pilots submit that, as a matter of First-Amendment law and the DFR, a court can impose no arbitration on nonunion employees in an agency-fee dispute; but, if arbitration can be required, it surely must provide for ***mutual*** selection of the actual arbitrator by the union ***and the nonunion employees***, not simply by the union through the union's self-selected surrogate. "By definition, an arbitrator must be a person chosen by mutual agreement." The "essential element of arbitration" is "that the selection of the particular arbitrator or the method of selection of an arbitrator be established by mutual agreement between the parties." *Bethlehem Mines Corp. v. Mine Workers*, 344 F. Supp. 1161, 1165 (W.D. Pa. 1972), *aff'd*, 494 F.2d 726 (3d Cir. 1974); *see Associated Plumbing & Mech. Contractors v. Plumbers Local 447*, 811 F.2d 480, 483-84 (9th Cir. 1987).

Therefore, to argue its case, ALPA must show that, in fact, the AAA's procedure is the practical equivalent of mutual selection of the arbitrator. The record, however, renders such a showing impossible, as that issue was not litigated below. ALPA's only other recourse is to contend that, even assuming the AAA's procedure is ***not*** the practical equivalent of mutual selection, nevertheless the procedure passes muster under the First Amendment. But this Court has already decided this issue

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[3] Some courts have held that the AAA's procedure satisfies *Hudson*'s requirement for an "impartial decisionmaker." *E.g.*, *Damiano v. Matish*, 830 F.2d 1363, 1372 (6th Cir. 1987). These opinions, though, dealt only with the situation in which nonunion employees might ***voluntarily*** use such a scheme. The AAA's procedure might arguably comport with *Hudson*, but only because nonunion employees could still bring their claims to court. To the extent that ALPA might argue that these cases support ***compelled*** arbitration, they are neither binding nor persuasive—because in this case there is no record as to whether the AAA's procedure is, in fact, as fair as mutual selection of the arbitrator. *See United Transportation Union v. State Bar*, 401 U.S. 576, 583 (1971).

adversely to ALPA, in *Hudson*, where it held that "review by a Union-selected arbitrator . . . is . . . inadequate" under the First Amendment. 475 U.S. at 308 (footnote omitted).

Thus, on the one hand, a writ of certiorari is unwarranted here because the factual record arguably necessary to bring ALPA's procedure outside the condemnation of *Hudson* is deficient; and constitutional questions should never be decided in a factual vacuum.[4] *See, e.g.*, *Abood v. Detroit Board of Educ.*, 431 U.S. 209, 236 n.33 (1977). On the other hand, a writ is not warranted because *Hudson* has already ruled adversely to ALPA on the fundamental constitutional question.

D. Finally, ALPA's claim that the issue of compelled arbitration "is a subject of squarely conflicting decisions among the Circuits," (Pet. at 11), is not well taken. As it must, ALPA concedes that most decisions of the courts squarely disallow compulsory arbitration of agency-fee disputes. (*See* Pet. at 13.) Given that these decisions arise in several different statutory contexts, their agreement on this point is significant:

- ***Under 42 U.S.C. § 1983***—*Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 694 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Hohe v. Casey*, 956 F.2d 399, 408-09, 413-14 (3d Cir. 1992); *Tierney v. City of Toledo*, 917 F.2d 927, 934-35, 939-40 (6th Cir. 1990); *Gibney v. Toledo Board of Educ.*, 532 N.E.2d 1300, 1303-05 (Ohio 1988); *see also Brosterhous v. State Bar*, 906 P.2d 1242, 1255-58 (Cal. 1995) (no exhaus-

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[4] This Court should wait for a case in which either "the arbitrator's selection [does] not represent the Union's unrestricted choice," *Hudson*, 475 U.S. at 308 n.21, in any sense, or in which there is a record as to whether or not a scheme such as ALPA's amounts in practice to such an "unrestricted choice."

tion required of attorneys challenging the amount of compulsory Bar dues).

- ***Under the National Labor Relations Act***—*Abrams v. Communications Workers*, 59 F.3d 1373, 1382 (D.C. Cir. 1995); *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367-68 (6th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

- ***Under the Railway Labor Act***—the District of Columbia Circuit's decision in this case. (App. at 4a-13a.)

The only decisions ALPA argues are favorable to its position are *Hudson v. Teachers Local 1*, 922 F.2d 1306 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) ("*Hudson II*"), and *Lancaster v. ALPA*, 76 F.3d 1509 (10th Cir. 1996). (Pet. at 12-13.)

Hudson II, however, did *not* involve ***any*** question of nonunion employees being compelled to arbitrate a dispute over the amount of an agency fee. At issue was only the adequacy of the union's ***notice*** of its so-called "fair-share fee," not "the issue of the accuracy of the fee itself." *See* 922 F.2d at 1309. Indeed, in the District Court, the nonunion employees in *Hudson II* settled part of the case by agreeing to a stipulated judgment that gave them an option voluntarily to challenge the amount of the fee in the union's internal arbitration procedure. *Id.* at 1311.

On appeal, the Court of Appeals clearly stated the limited nature of the issue in *Hudson II*. Quoting this Court's holding in *Hudson* that "the constitutional requirements for the [union's] collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending," the Court of Appeals explained that "[t]he [nonunion employees'] attack focuses on the ***first*** requirement: an adequate explanation of the basis for the fee." *Id.* at 1313 (emphasis added) (quoting *Hudson*, 475 U.S. at 310). And the

question the court actually decided was "whether the ***notice*** gives the nonunion [employees] enough information to challenge the basis for the fee," and "sufficient information to enable the [employees] 'to decide whether there is any reason to mount a challenge'." *Id.* at 1314, 1316 (emphasis added).

So *Hudson II* is no precedent for ALPA's claim. As the Sixth Circuit concluded in *Bromley*, *Hudson II* "did not hold that exhaustion of the arbitral remedy could be required as a condition to the bringing of a § 1983 action." 82 F.3d at 694. Moreover, ***if*** *Hudson II* had held that exhaustion was required, it would have contradicted this Court's "categorical[ ]" holding that "exhaustion is not a prerequisite to an action under § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982); *see Felder v. Casey*, 487 U.S. 131, 146-50 (1988).[5]

Although a bare precedent, *Lancaster* is highly unconvincing. First, *Lancaster* wrongly interpreted *Hudson II* as having "held [that] a dissenting employee must exhaust all available nonjudicial remedies." It then "conclude[d that] the . . . holding in *Hudson [II]* was correct" and "adopt[ed] it as the law of th[e Tenth] Circuit." 76 F.3d at 1521-22. Thus, *Lancaster* not only stands on a misreading of *Hudson II*, but also goes against this Court's decisions in *Patsy* and *Felder*.

Second, *Lancaster* allowed the nonunion employee there to pursue his suit, though he had not exhausted the union's arbitration, because the union had earlier failed to provide a *Hudson* notice containing sufficient information about the nature of certain allegedly chargeable assessments. 76 F.3d at 1525-27. Thus *Lancaster* itself supports the conclusion that any case, such

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[5] It is hard to believe that, having been told by this Court in *Hudson* that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action," 475 U.S. at 308 n.21, the lower courts on remand would cavalierly disregard that admonition, ignore *Patsy* and *Felder*, and require the nonunion employees to exhaust arbitration.

as this,[6] in which nonunion employees allege a defective notice (in addition to claims that an agency fee is unlawfully calculated) can properly begin in federal court. But why exhaustion of a union's arbitration scheme should come into play ***after*** a federal court has already asserted jurisdiction is not easy to imagine. *Cf. Beck v. Communications Workers*, 468 F. Supp. 87, 91 (D. Md. 1979) ("a stay pending exhaustion of the union rebate procedure would not be helpful in promoting the ultimate resolution of the controversy," because it "is extremely unlikely that exhaustion will substantially alter the positions of the parties").

In sum, as to its first issue, ALPA makes no case for a writ of certiorari.

II. That a Federal Court Should Give No Deference to the Decision of a Union's "Impartial Decisionmaker" in an Agency-Fee Dispute Was Implicitly Decided in *Hudson*, and Ought Not to Be Revisited on the Record Here.

ALPA's second issue is also not worthy of a writ of certiorari. Limited judicial review of arbitration awards is based on the principle that, "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). That principle is inapplicable here, because the Pilots did not contract to have their dispute with ALPA settled by its arbitrator. (App. at 2a-3a.)

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[6] The Pilots alleged that ALPA's "1990 and 1991 statements [of chargeable and nonchargeable expenses] constituted inadequate notice under *Hudson* because they were not 'audited.'" (App. at 15a.) They also alleged that the 1992 statement was inadequate notice because the method by which the audit of that statement was done "violated generally accepted accounting principles." The Court of Appeals held that there was a genuinely disputed factual issue as to the latter claim. (*Id.* at 16a-19a.) Thus, even under *Lancaster*, exhaustion was not required here.

Moreover, ALPA concedes that *Hudson* has already ruled that an "arbitrator's decision would not receive preclusive effect in any subsequent . . . action" in federal court over an agency-fee dispute. (Pet. at 14 (quoting *Hudson*, 475 U.S. at 308 n.21).) Importantly, for this proposition *Hudson* cited *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

McDonald held that, "in a § 1983 action, a federal court should not afford . . . collateral-estoppel effect to an award in an arbitration proceeding." 466 U.S. at 292. *McDonald* also described "a rule that would have required federal courts to ***defer*** to an arbitrator's decision" as one that would "***preclude*** a subsequent suit in federal court." *Id.* at 288-89 (emphasis added). Thus, per *McDonald*, *Hudson*'s ban on deference to arbitration clearly embraces factual issues. *See McDonald*, 466 U.S. at 287 n.5 (collateral estoppel applies to issues of fact), 292 ("a federal court should not afford . . . collateral-estoppel effect to an [arbitrator's] award"), 292 & n.13 ("an arbitration proceeding cannot provide an adequate substitute for a judicial ***trial***"; it "is the duty of courts to assure the ***full*** availability of th[e judicial] forum") (emphasis added).[7]

That *Hudson* arose under § 1983, whereas this case arises under the RLA, is immaterial. First, in both *Hudson* and here, the nonunion employees asserted First-Amendment rights. *Compare Hudson*, 475 U.S. at 306, *with Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984). Second, *McDonald* based its rejection of preclusion "in large part on [the] conclusion that Congress intended the statutes at issue . . . to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings . . . under those statutes." 466 U.S. at 289. But, as this Court explained in *Communications Workers v. Beck*,

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[7] The judicial forum is not fully available where, as here, the District Court, contrary to Federal Rule of Civil Procedure 56, deferred to the arbitrator's resolution of genuinely disputed issues of material fact. (*See* App. at 19a-20a.)

"the RLA . . . leaves it to the courts to determine the validity of [union] activities challenged under the Act." 487 U.S. 735, 743 (1988).

A claim that a union exacts agency fees "beyond those necessary to finance collective-bargaining activities" alleges a breach of the DFR, over which federal courts have jurisdiction. *Id.* at 742-44. The RLA "contemplates resort to the usual judicial remedies . . . for breach of that duty." *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 207 (1944). Thus, just as with § 1983, the DFR interposes the federal courts as the guardians of individuals' rights. *Compare McDonald*, 466 U.S. at 290, *with Vaca v. Sipes*, 386 U.S. 171, 181-82 (1967).

ALPA argues, however, that *Hudson's* categorical statement nevertheless left open "deference [to the arbitrator's decision] short of 'preclusive effect,'" and that this "deference" should encompass acceptance of the arbitrator's "findings of fact . . . 'unless clearly erroneous.'" (Pet. at 14.) In support of this notion, ALPA cites only two opinions of district courts, ***both of which were reversed on appeal***. (Pet. at 14-15.)

One (the District Court in this case) was reversed because the Court of Appeals rejected ALPA's whole theory of exhaustion, (App. at 4a-13a.); the other (a district court in Michigan), because the Court of Appeals rejected the union's "deference" argument on its demerits, *Bromley*, 82 F.3d at 692-95. ALPA's own showing thus belies its contention that this "question is independently important, and will continue to recur and cause confusion and needless litigation until it is finally resolved by this Court," (Pet. at 15).

III. That Courts Should Determine Whether Auditors Have Properly Verified a Union's Agency-Fee Notice Was Implicitly Decided in *Hudson*, and Ought Not to Be Revisited on the Record in This Case.

Hudson ruled, as a matter of First-Amendment law, that in collecting agency fees "adequate disclosure [by the union] surely would include . . . verification by an independent auditor," *i.e.*, an "independent audit." 475 U.S. at 307 n.18, 310 & n.23. ALPA claims that "the issue [of verification] has spawned extensive litigation in the federal courts." (Pet. at 15 & n.6.) But it nowhere denies that, in all that litigation, the courts have agreed on what "verification" means. Universally, "verification" under *Hudson* "must be what an accountant would do when undertaking an audit." *Hohe v. Casey*, 727 F. Supp. 163, 166 (1989), *final judgment*, 136 L.R.R.M. (BNA) 2198 (M.D. Pa. 1990), *aff'd in part, rev'd in part on other grounds*, 956 F.2d 399 (3d Cir. 1992); *see, e.g., Ferriso v. NLRB*, 156 L.R.R.M. (BNA) 2321, 2326-27 (D.C. Cir. Sept. 23, 1997); *Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991).

ALPA contends that a court should limit its review of an auditor's verification of agency-fee calculations to issues of "fraud or intentional deception." (Pet. at 16-17.) It cites no authority for this, however. No such authority exists. As the Court of Appeals recognized, "*Hudson* did not stand for the proposition that a rubber stamp by an accountant stating 'this was audited' meets the constitutional minimum it envisioned." (App. at 18a.)

Moreover, the appropriateness of the accounting procedures and standards the auditor employs, are obvious questions of ***fact***, which the federal courts have routinely recognized must be determined in an evidentiary hearing. *See Tierney v. City of Toledo*, 917 F.2d 927, 934, 936 (6th Cir. 1990); *Gwirtz v. Ohio Educ. Ass'n*, 704 F. Supp. 1481, 1482-83 (N.D. Ohio 1988), *aff'd*, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *compare Hohe v. Casey*, 740 F. Supp. 1092, 1096

(summary judgment denied), *further proceedings*, 727 F. Supp. 163 (1989), *final judgment*, 136 L.R.R.M. (BNA) 2198 (M.D. Pa. 1990), *aff'd in part, rev'd in part on other grounds*, 956 F.2d 399 (3d Cir. 1992), *with id.*, 727 F. Supp. at 165-66.

Thus, nothing on the record here raises an issue of law worthy of a writ of certiorari concerning the Court of Appeals' decision to remand the verification issue for the district court to make independent factual findings, (App. at 17a-19a).

IV. Except in Limited Circumstances in the Public Sector, This Court Has Consistently Held Lobbying of Government by a Union Not to Be Lawfully Chargeable to Objecting Nonunion Employees.

ALPA's contention that this Court ought to find its lobbying activities chargeable to the Pilots, (Pet. at 17-22), is even less worthy of a writ of certiorari than its other claims.

This Court's decisions do not allow a union in the private sector to charge its lobbying to nonunion employees. The "*Beck* and *Ellis* holdings foreclose the exaction of mandatory agency fees for [legislative] activities." *Abrams*, 59 F.3d at 1380; *accord Beckett v. ALPA*, 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring); *see Ellis*, 466 U.S. at 447 ("those who objected could not be burdened with ***any*** part of the union's expenditures in support of political or ideological causes") (emphasis added); *Machinists v. Street*, 367 U.S. 740, 768-69 & n.17 (1961) (political and ideological activities, including "lobbying," not chargeable); *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991) (the Court's RLA cases "establish that, at least in the private sector, [lawfully chargeable] functions do not include political or ideological activities"). That unequivocal ban includes "[s]upport for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions." *Ellis v. Railway Clerks*, 91 L.R.R.M. (BNA) 2339, 2342-43 (S.D. Cal. 1976), *incorporated*, 108 L.R.R.M. (BNA) 2648 (S.D. Cal. 1980), *aff'd in part, rev'd in part on other grounds*, 685 F.2d 1065 (9th Cir. 1982), *aff'd in part, rev'd in part on other grounds*, 466 U.S. 435 (1984).[8]

In the public sector, some union lobbying may be chargeable to nonunion employees, because of "the inherently political nature of salary and other workplace decisions in public employment," and because of "[t]he dual roles of government as employer and policymaker" with respect to "ratification of negotiated agreements" and "appropriations for approved collective-bargaining agreements." *Lehnert*, 500 U.S. at 519-20. That is, in public-sector employment, collective bargaining and lobbying may often operationally amount to the same activity, because the employer is a governmental body.

Here, conversely, nothing in the record even faintly suggests that any of ALPA's lobbying is remotely analogous to what goes on in some public-sector situations—nor could it. The employers with whom ALPA negotiates have no "dual roles"; and, the "salary and workplace decisions" with which they concern themselves are not "inherently political" in nature. Where, as here, lobbying relates merely to "support of the employee's profession . . . , the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Id.* at 520.

Indeed, before this Court ALPA itself candidly describes its collective bargaining and its lobbying activities as conceptually separate and distinct from each other:

> To the extent that ALPA ***negotiates*** directly with the airlines on matters relating to

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[8] *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is not to the contrary, as the Petition at 21 suggests. In the passage taken out of context by ALPA, *Glickman* was describing the holding of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), "and the cases that follow it," *i.e.*, the public-sector cases. *See Glickman*, 117 S. Ct. at 2139.

> safety, no one disputes that the costs can be charged to agency-fee payers. The court of appeals held, however, that when ALPA pursues the same safety goals through ***advocacy*** before government agencies, it is engaging in "lobbying" and the costs cannot be charged to agency-fee objectors.

(Pet. at 19 (emphasis added).)[9]

Negotiation and contract administration are statutorily mandated procedures between employer and union under the RLA. Advocacy before government agencies is not. ALPA may be the Pilots' exclusive representative for dealing with their employer in bargaining and grievance handling. It is no representative of theirs at all, however, for advocacy to the government. Surely, it owes the Pilots no statutory duty to lobby any governmental agency on matters related to their employment. *See National Treasury Employees v. FLRA*, 800 F.2d 1165, 1166-71 (D.C. Cir. 1986) (2-1 decision); *Florey v. ALPA*, 439 F. Supp. 165, 169-70 (D. Minn. 1977), *aff'd*, 575 F.2d 673 (8th Cir. 1978). And, absent such a duty, it can assert no right to collect fees from them for such activities.

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[9] There is no "bright line between . . . general political activities" and "advocacy that concerns matters that directly impact the working conditions of employees that a union represents," as ALPA disingenuously suggests, (Pet. at 21). As the Court of Appeals recognized, under ALPA's theory, "virtually all of its political activities," including "lobbying for increased minimum wage laws or heightened government regulation of pensions[,] would also be germane." Moreover, even ALPA's "lobbying on safety-related issues" is not "somehow nonpolitical because all pilots share a common concern with these activities"; as the Court of Appeals also recognized, "it would certainly not be unexpected that pilots would have varying views as to the desirability of governmental regulation—including those regulations of airlines that pertain to safety." (App. at 14a.)

CONCLUSION

ALPA presents no cogent reason for a writ of certiorari in this case. With respect to all issues ALPA has raised, the Court of Appeals' decision correctly followed the applicable decisions of this Court. ALPA suggests no conflict among the Courts of Appeals concerning the issues other than exhaustion of arbitration, and no real conflict exists concerning that issue. Therefore, ALPA's petition should be denied. If a writ of certiorari is granted, the Court of Appeals' decision should be summarily affirmed.

Respectfully submitted,

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